

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Minnesota Petition for Declaratory)

Ruling Concerning Access to Freeway)

Rights-of-Way Under Section 253 of the)

Telecommunications Act)

CC Docket 98-1

OPPOSITION OF THE NATIONAL TELEPHONE
COOPERATIVE ASSOCIATION TO MINNESOTA'S PETITION
FOR DECLARATORY RULING

The National Telephone Cooperative Association ("NTCA") hereby comments on a Petition for Declaratory Ruling filed on December 30, 1997, by the State of Minnesota. NTCA is a national association of approximately 500 local exchange carriers ("LECs") providing telecommunications services to end users and interexchange carriers throughout rural America. It has twenty-one Minnesota members that could be adversely affected by the Minnesota agreement at issue in this proceeding.

BACKGROUND

The state of Minnesota through the Minnesota Department of Transportation ("Mn/DOT") has an exclusive agreement which stipulates that International Communications Services ("ICS")/Universal Communications Networks ("UCN") and Stone & Webster ("Stone") will build a fiber-optic network along the state's interstate highways in exchange for allowing the state free use of 20 percent of the network. It has asked the Commission to declare that this

agreement is consistent with section 253 of the Telecommunications Act of 1996¹. The Minnesota Telephone Association (“MTA”) protests the plan to permit only a single developer to install, operate and maintain the fiber network in State freeway rights-of-way. NTCA shares the concerns of the Minnesota Telephone Association that this exclusive agreement would have an anticompetitive effect on its members ability to provide competing services.

DISCUSSION

I. AN EXCLUSIVE USE OF THE PUBLIC’S RIGHTS-OF-WAY WOULD PREVENT OTHER POTENTIAL COMPETITORS FROM PROVIDING COMPARABLE SERVICE TO THE GENERAL PUBLIC AS WELL AS TO ALL STATE AGENCIES

Section 253(a) of the Telecommunications Act² establishes that a state cannot enact any legal requirement that limits the ability of a carrier to provide any interstate or intrastate telecommunications service. The agreement reached between the Mn/DOT and Stone represents a legal requirement prohibited under section 253(a).³ Congress surely intended that contracts and other instruments that have the force of law are included in the term “legal requirement.”⁴ The contract between Stone and Mn/DOT directly prevents other carriers from competing to provide a wide range of services as well as any of the state’s business. In particular, the agreement automatically designates Stone as the dominant provider of fiber-optic capacity over the freeway rights-of-way and precludes other carriers from building their own facilities on the rights-of-way. Thus, Stone has the advantage of unlimited access which gives them the ability to offer their

¹ 47 U.S.C. § 253(a).

² Id.

³ Id.

⁴ Id.

service unhampered and before any other carrier. Stone has the ability also to prevent other carriers from offering comparable telecommunications services to the public at a competitive rate because of its monopoly power over the rights-of-way. Consequently, every other competitor is locked out of an essential facility by the exclusive terms of the deal.

The state cannot escape the statute by transferring its right to manage the right-of-way to a second party that limits access and enforces exclusivity. According to the agreement, the state automatically receives access to 20 percent of the capacity of the network, thereby automatically shutting out other competing carriers from serving this highly lucrative market. The exclusivity arrangement clearly prohibits competing carriers from potentially serving the public with their competing services, as well as the entire “state business” market.

Additionally, this exclusive right to use the freeway rights-of-way violates section 253(a) because the statute clearly bars legal requirements that have the effect of restricting other competing carriers means of providing telecommunications services. While these locked out providers might be able to offer the state resale on a “wholesale” basis, the agreement makes resale an undesirable economic option. Further, the Act bars state action that prohibits “any entity” from providing “any” service.⁵ The agreement is unlawful because it also impedes the ability of other carriers to use the freeways to offer services to the state via the facilities based route. In the *Texas Public Utility Regulatory Act Memorandum Opinion and Order*,⁶ the Commission underscored how any exclusive agreement could potentially shut out competing

⁵ Id.

⁶ In the Matter of The Public Utility Commission of Texas, et al., CCB Pol 96-13, et al., Memorandum Opinion and Order, FCC 97-346, ¶ 89 (rel. October 1, 1997) (Texas Public Utility Regulatory Act Memorandum Opinion and Order”).

carriers because these carriers would be forced to incur additional costs and thus prevent them from offering a viable service alternative. In this case, there is only one freeway right-of-way and it would not be economically feasible or possible for other potential carriers to build their own freeway right-of-way.

II. A STATE CONTROLLED PERMITTING PROCESS AND CONSTRUCTION GUIDELINES ARE A REASONABLE ALTERNATIVE

Section 253(b)⁷ illustrates that a state cannot be precluded from imposing requirements that are necessary to protect the public's safety. NTCA does not dispute that the statute allows the state to impose requirements that are necessary to promote the public welfare, but believes that this exclusivity agreement is not necessary. There are other viable options that the Mn/DOT can undertake without completely allocating the entire freeway to an exclusive fiber optic communications network. Moreover, it appears that through this agreement, Mn/DOT is attempting to absolve itself from managing its responsibilities under the Act by assigning such responsibilities to a private entity. Mn/DOT must provide ample evidence to show that its actions are necessary in order to protect the public safety, as well provide a detailed analysis of why consumers would be better off without more competitors in this market. It has not done so in this case.

Next, section 253(b)⁸ of the Act establishes that a state has the jurisdiction to advance and protect the public safety and rights of consumers only when this is accomplished on a "competitively neutral" basis. As relevant here, the Act limits the state's ability to justify its decision on public safety grounds. The public safety can be protected by other alternatives, such

⁷ 47 U.S.C. § 253(b).

⁸ 47 U.S.C. § 253(b).

as establishing a permit process. The state could also establish clear public safety guidelines without going as far as it did here.

III. THE EXCLUSIVE ARRANGEMENT SERIOUSLY IMPEDES OTHER CARRIERS ABILITY TO PROVIDE SERVICES ON A COMPETITIVELY NEUTRAL BASIS

Competitive neutrality is compromised by the Stone arrangement. As stated previously, the agreement allows all state agencies the free use of Stone's facilities. By creating a private entity as the monopoly manager of this fiber optic capacity, the state has inhibited other competing carriers' ability to offer comparable services to the public. This exclusive use arrangement cannot by its terms be offered to anyone else. Because Stone has exclusive control of the freeways and the right to provide telecommunications services to the state in exchange, it grossly benefits as other competing carriers quickly cannot offer the public a comparable alternative and Stone is an instant "winning provider" at the expense of all other carriers.

The agreement goes beyond what is needed and results in discrimination against other carriers. Under section 253(c),⁹ the state and/or local governments have the right to manage the public rights-of-way or to require fair compensation from providers on a "nondiscriminatory basis." The state's decision to exclude all others except Stone is not necessary to preserve its right to "manage" or receive fair compensation. Other carriers are not unwilling to pay the state for use of the freeways. Competing carriers are at a clear disadvantage in terms of offering service, as these carriers do not "share . . . access to any trenches, innerducts, conduits."¹⁰ Stone alone may plough fiber or access freeway trenches for its convenience. Other carriers will be

⁹ 47 U.S.C § 253(c).

¹⁰ Agreement to Development and Operate Communications Facilities, December 23, 1997, State of Minnesota-ICS/UCN LLC-Stone & Webster, § 7.4.

forced to use more expensive and less accessible highway rights-of-way, or to gain access to the freeway rights-of-way on Stone's terms. According to the language of the agreement, service to others in the public will be fully contingent on the consortium's provision of access. As written, the contract would give Stone, if it were a local exchange carrier, carte blanche to violate section 251(b)¹¹ which sets out the duty of all local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way." The agreement stifles the means by which other carriers can compete by forcing them to rely on a third party with no incentive to encourage competition or facilitate entry. It gives other carriers no rights or options for planning the deployment of their facilities. Carriers are wholly at the mercy of Stone's schedule and are left with no ability to meaningfully gain access to the rights-of-way.

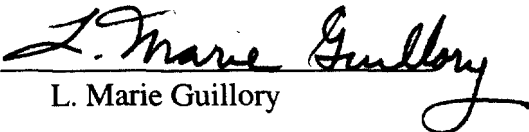
¹¹ 47 U.S.C. § 251.

CONCLUSION

For the reasons listed above, NTCA supports the MTA and believes it is appropriate for the Commission to preempt the state's decision to permit the agreement between the Mn/DOT and Stone.

Respectfully submitted,

NATIONAL TELEPHONE COOPERATIVE
ASSOCIATION

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March 9, 1998

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Opposition of the National Telephone Cooperative Association to Minnesota's Petition for Declaratory Ruling in CC Docket No. 98-1 was served on this 9th day of March 1998, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:


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